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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No.

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Petitioner (Appellee below).

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause (R. 214) which reversed the judgment of the District Court of the United States for the Northern District of California, Southern Division (R. 59).

OPINIONS BELOW.

The opinion (R. 44-51) and findings of fact and conclusions of law (R. 69-79) of the District Court are not reported. The opinion of the Circuit Court of Appeals (R. 204-213) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered November 5, 1946 (R. 214) and rehearing was denied December 5, 1946 (R. 215). Jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. § 347). The decision below has decided important questions of federal law which have not been, but should be settled by this Court and it also "involves principles of far-reaching effect which have a direct bearing on the general walfare", as fully set forth hereinafter.

FEDERAL STATUTE INVOLVED.

Section 7(a) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. § 207) provides under the heading "*Maximum Hours*":

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date,
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed * * *"

STATEMENT OF THE CASE.

This is an action brought under the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C.A. Sec. 201 et seq.) by certain employees of petitioner to recover alleged unpaid wages and liquidated damages. Petitioner was operating a gold mine in Juneau, Alaska (R. 128, 138, 70), when the Act became effective in October, 1938, and was paying the best and highest wages of any hard rock mine anywhere (R. 140, 70). To meet the requirements of the Act it adopted a wage and hour system which this Court, in a

case presenting similar facts, held to be in compliance with the Act. That case held:

> "But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."
>
> (*Walling v. Belo Corp.*, 313 U. S. 624, 630.)

The basic regular hour wages were reduced so that when added to the overtime pay the total wage received after the Act went into effect was slightly more than formerly (R. 141, 70). Because of the low grade of the ore, low costs were vital and any considerable increase in wages would have resulted in a total shut-down, which later happened in 1944 for this very reason (R. 140, 172, 70). Regular time was paid for the first 44 hours of the week and time and a half for all additional hours (R. 123, 70). Under this system the men who laid off a day or more during the week lost overtime because their weekly hour total dropped below 44 hours (R. 130, 143, 150, 71). Therefore, in October, 1939, after a year of this admittedly valid system of payment had continued, and when, under the terms of the Act the regular workweek was shortened from 44 to 42 hours, the men, through their union, having heard of a split-day plan of paying wages in Butte, Montana, demanded that for 6-day a week men the first seven hours of each day be treated as regular time and the eighth hour as overtime (R. 110, 130, 150-1, 71-2). For 7-day a week men the first six hours of each day were to be treated as regular time and the last two hours as overtime (R. 166-171, 72). By this plan, since all

employees were credited with overtime each day, the men who did not work for a day or more during the week would be paid these overtime wages for each day they did work (R. 130, 150, 72). Petitioner, with some reluctance, because of the increased cost, put this plan demanded by the men into operation. The revised agreement of October, 1939 (Ex. F and attached schedule), recites that the new wage schedule was "submitted to the company" by the Union, and was "computed upon the basis suggested by the Union." (R. 72.) The amount of wages due each employee was calculated by the bookkeeper bi-monthly for the previous half month. Therefore, after the new plan went into effect, the practical result was that after the week's work had all been done, instead of taking the first 42 hours of the week and treating it as all regular time and the remaining 6 hours at the end of the week as overtime, as petitioner had been doing under the prior "*Belo* case" plan, the bookkeeper distributed the same number of regular and overtime hours through the days of the week as the men had demanded should be done (R. 72). The men who worked full time were credited with 42 regular time hours per week paid for at the agreed upon hourly rate and 6 overtime hours (6) per week paid for at the overtime rate, and consequently received substantially the same pay that they would have received under the previous admittedly lawful plan.* The only men to whom the change in plan made any substantial difference were those who laid off a day or more during the week. These men benefited materially because they

*As a matter of fact they received a little increase in pay (R. 129, 151, 72).

received overtime pay for each day they worked, which additional pay they would not have received under the previous valid *Belo* plan of payment inaugurated by petitioner.

In May, 1940, five months before the 40 hour workweek became effective under the Act, petitioner entered into a new annual contract with its employees, giving them an additional five months advantage to enjoy the benefit of the 40-hour week (which under the Act did not become effective until October), and the schedule of hours was changed again so as to continue to meet the insistence of the men that overtime be credited daily instead of weekly. For 6-day men the first 6.6 hours of each day were treated as regular time and the last 1.4 hours as overtime. For 7-day men the first 5.7 hours of each day were treated as regular time and the last 2.3 hours overtime. The practical results were the same as under the previous schedule. Men who worked full time were credited with the number of hours of regular time and overtime that they would have been credited with if the earlier admittedly lawful Belo method of calculating wages had persisted.* The real difference was merely one of entering the hours on the books and crediting overtime each day of the week instead of lumping it all at the end of the week. The total weekly pay remained substantially the same, or was increased a little, for men working full time (R. 129, 151, 72-73). On the other hand, just as was the experience with the previous 42 hour workweek, men who laid off during the

*As a matter of fact petitioner again gave the men the slight advantage that resulted from using decimals instead of fractions in dividing the hours of the day into regular and overtime hours.

week received credit for and were paid daily overtime which they would not have received had the earlier admittedly lawful *Belo* case method of concentrating overtime at the end of the week prevailed.

The Wage-Hour Administrator meanwhile had claimed that any split-day plan was in violation of the Act (ignoring the benefit to the men who laid off during the week) and threatened to bring an action in West Virginia, the state of petitioner's corporate organization. To avoid the expense and hardship of transporting witnesses all the way from Alaska to West Virginia (witnesses vital to petitioner's operations in Alaska), petitioner stipulated to the entering of a consent decree in the federal court in San Francisco and abandoned the split-day method of calculating wages and on May 1, 1941, returned to the *Belo* case plan of wage payment. Petitioner at all times reserved all legal rights, insisting that the split-day plan agreements of October, 1939, and May, 1940, were not a violation of the Act (R. 124-128, 73-74, Exs. B., 2 and 3).

Respondents, appellants below, who were among the men who benefited by this change of plan, adopted solely because of their insistence, then brought this action to recover claimed overtime and liquidated damages under the Act (R. 2-24). The trial Court held that the split-day method of calculating wages did not violate any of the wage-hour provisions of the Act (R. Opinion, 44-51, Findings 69-78). The Circuit Court of Appeals decided in effect that all split-day plans of paying wages are a violation of the Act and that overtime hours must be relegated to the very last work hours of the week and also

held that the fact that the employees were solely responsible for the change from an admittedly valid plan to the split day plan, the validity of which is here in question, was no defense and reversed the trial Court (R. 204-213).

QUESTIONS PRESENTED AND ERRORS OF THE CIRCUIT COURT OF APPEALS SPECIFIED.

1. Did the Circuit Court of Appeals err in holding that the split-day method of paying wages, described in detail in the foregoing fact statement, is a violation of the Fair Labor Standards Act?

2. Did the Circuit Court of Appeals err in holding that regular rate pay must be applied to the first 40 hours of the workweek and that no overtime may be credited to the last hours of each day during the week but can only lawfully be applied to those hours at the end of the workweek which are in excess of 40 hours?

3. Did the Circuit Court of Appeals err in holding that where the employees were solely responsible for the adoption of the split-day plan of paying wages and benefited thereby at the expense of petitioner, nevertheless the employees are not equitably estopped from recovering additional wages and liquidated damages under the Act?

4. Did the Circuit Court of Appeals err in holding that the cases of *Walling v. Helmerich & Payne*, 323 U. S. 37, and *Walling v. Alaska Pacific Cons. M. Co.*, 152 Fed. 2d 812, are controlling precedents?

5. Did the Circuit Court of Appeals err in holding that the principle of equitable estoppel laid down in the case of *Daniels v. Tearney*, 102 U. S. 415, and similar cases decided by this Court to the effect that no one may be allowed "to profit by his own wrong", is not applicable in the instant case?

6. Did the Circuit Court of Appeals err in reversing the decision of the trial Court?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) Important questions of federal law involving the Fair Labor Standards Act are here involved which have not been and should be finally determined by this Court. These questions have been set forth in detail in the foregoing statement of "Questions Presented." The principal one is whether the split-day plan inaugurated in the instant case at the demand of the employees and for their express benefit is a violation of the Act.

(2) To allow the decision of the Appellate Court below to stand would mean that where the Act was already being complied with in every respect, the employees who are unfortunate enough to lose time during the week may not better their wage status so as to receive overtime compensation calculated on a daily basis. The wages of full time workers were not affected one iota by the change in plan. This petition seeks to give such employees as work only part time the financial advantage of having their overtime pay calculated daily instead of weekly, in which latter event there would be no overtime, and requests a final decision that such a plan of wage payment is lawful.

(3) This petition seeks to secure reaffirmance of this Court's ruling in *Daniels v. Tearney*, 102 U. S. 415 and many similar cases that under like circumstances no one may be permitted "to profit by his own wrong." The employees who worked part time profited by the split-day plan. May they now repudiate it, keep the profits received under their own plan, and additionally profit by what amount to penalties under the Act?

(4) This Court has pending before it four cases involving what is commonly referred to as the Krug-Lewis soft coal contract, dated May 29, 1946, and prior contracts which it incorporates, which contain split-day wage provisions identical in character with those here brought into question in the instant case. These cases are No. 759, *United States v. United Mine Workers of America;* No. 760, *United States v. John L. Lewis;* No. 781, *United Mine Workers of America v. United States;* and No. 782, *John L. Lewis v. United States.* The general public interest in the validity of the Krug-Lewis contract and the prior agreements which it incorporates and other contracts throughout the United States containing split-day clauses, justifies this Court in granting the writ here prayed for and in reversing the judgment of the Circuit Court of Appeals, thus avoiding the creation of a judicial precedent which, if followed, would result in the inevitable result that the Krug-Lewis and other similar wage-hour contracts would be held also to violate the Act in this same respect. It is of major national importance that this erroneous precedent should be corrected, as is more fully pointed out hereinafter.

THERE IS NO INHERENT VICE IN THE SPLIT-DAY PLAN OF WAGE PAYMENT.

The Appellate Court below in effect held that the "split-day" method of wage payment is *per se* a violation of the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C. §210 et seq.) and that under no conceivable circumstances can such a plan be valid. Petitioner inaugurated a new plan of wage payment when the Act went into effect in October, 1938. This Court in the *Belo* case (316 U. S. 624) held a similar plan to be valid.

In October, 1939, very reluctantly, because of the overtime wages which would have to be paid to those men who laid off during the week, and which were not payable under the Belo plan contract, petitioner yielded to the demand of the union and put in effect the union's split-day system of paying wages. Petitioner had been paying the 6-day men for a 48-hour week, 44 hours regular or "straight" time and the last 4 hours overtime (time and one half). Consequently, the men who laid off a day or more during the week through illness, or other reason, lost all overtime for that week. To remedy this, in October, 1939, the union's split-day plan was adopted, which, for 6 day a week men, treated the first 7 hours of each day as regular or "straight" time and the last hour of each of the six days as overtime.* By this split-day method of allocating

*In October, 1939, by the terms of the Act a work week of regular time was reduced from 44 to 42 hours. The Court of Appeals in its opinion states that "the 'straight' or 'regular' hourly rate of pay was reduced" (R. 205, 206) when the October, 1939, and May, 1940, wage agreements were entered into. This very slight adjustment because of dropping from 44 to 42 regular workweek hours in 1939, and again from 42 to 40 hours in 1940, as required by the Act, had nothing whatsoever to do with the inauguration of the union's split-day plan. A similar adjustment had already

wages the men were credited with one hour of overtime each day, and those men who lost a day during the week would still receive 5 hours overtime wages, even though they worked only 5 days. This overtime they would not have received under the previous admittedly valid plan. The men who worked full time received credit for the identical number of hours of regular time and overtime during the week under either plan, as is evidenced by the following table comparing the two plans:

Split-day calculation actually made for each day for a 6 day a week man			If calculation had been made weekly instead of daily, and hence lawful under the Belo case	
	Regular Rate	Overtime	Regular Rate	Overtime
Mon.	7	1	8	none
Tues.	7	1	8	none
Wednes.	7	1	8	none
Thurs.	7	1	8	none
Fri.	7	1	8	none
Sat.	7	1	2	6
	42 hours regular time	6 hours overtime	42 hours regular time	6 hours overtime

The same result was reached when, because of the provision in the Act, the regular hours per work week

been made in October, 1938, when the Act became effective, and the same adjustments in 1939 and 1940 would have been made in any event had the valid Belo plan of paying wages persisted. The Belo case held such adjustments, when agreed to by the employee, as was the case here, were in full compliance with the Act. As a matter of fact, the appellate court below was in error in making its statement as broad as it did. For example, in the case of Robertson, the principal plaintiff, representing the other plaintiffs, the records show that there was no reduction whatsoever in his "regular" hourly rate when the new May, 1940, wage agreement was made. His regular hourly rate remained identically the same as it was under the previous October, 1939, contract, namely 61 cents (Exs. F, G, and 3A).

were in October, 1940, dropped from 42 to 40. Petitioner gave the men the advantage of this 40 hour week, 5 months in advance, when on May 1, 1940, it entered into a new annual wage agreement. To continue to comply with the men's demand for a split day, the split day was changed to 6.6 regular hours and 1.4 overtime hours. Petitioner gave the men every advantage in making this change, as already noted in the STATEMENT OF FACTS. The men who worked full time were credited with the same total number of regular time and overtime hours and received the same wages or slightly more than they were receiving when the wages were paid under the previous plan held lawful in the *Belo* case (R. 73, 151, 157, 178).*

THE ACT DOES NOT REQUIRE THAT THE REGULAR RATE MUST BE PAID FOR THE FIRST 40 HOURS OF THE WORK-WEEK.

The decision of the Circuit Court of Appeals proceeds on the assumption that it is only the *first* 40 or 42 hours, as the case may be, which can lawfully be credited with "regular" or "straight" time (R. 208). The fact that during the workweek the employee is actually paid for 40 or 42 hours at regular time rates, though it may not be the first 40 or 42 hours, does not in its opinion afford

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*Counsel for respondents contended below that the change to the split day plan was a disadvantage to the men who worked full time because they would receive no overtime pay if they only worked the first half of the sixth day of the week and under the Belo plan they would receive overtime pay. This argument utterly ignores the fact that such full time men would, on the morning of the sixth day, already have received 5 overtime hours credit.

any mitigation. It must be the first 40 or 42 hours, even though the practical result as far as total of wages received is substantially the same, or slightly more, as was the case here. Such a conclusion is not logical. It shocks one's sense of justice and fair dealing.

The Act itself (52 Stat. 1060, 29 U.S.C. § 201, et seq.) does not so provide. Section 7(a), subdivisions 2 and 3 (§ 207) states that a work week shall not be "longer than" 42 or 40 hours.

> "unless such employee receives compensation for his employment *in excess of the hours above specified* at a rate not less than one and one-half times the regular rate at which he is employed." (Emphasis ours.)

In the instant case this italicized provision of the Act has been literally complied with.

Nowhere in the act is the phrase "the first" 40 hours found, nor is there any phraseology used from which this conclusion can be successfully reached. If it had been the intention of Congress to limit the hours of regular pay to the *first* 40 or 42 or 44 hours of the week, as the case may be, it would have been easy to have said so. While the Courts have frequently referred to the "first forty hours" in decisions involving the act, a careful analysis of those cases indicates that in none of them was it a vital consideration as to whether or not the *first* 40, 42 or 44 hours must be the only hours to receive "regular rate" pay.

The agreement of October 24, 1939 (Ex. F., p. 1) expressly provided for a 42-hour week of regular pay and all time "in excess of 42 hours per week" was to be con-

sidered as overtime. Similarly, the agreement of May 1, 1940 (Ex. A, Par. 8, Sub. a), expressly provided for payment of overtime for all hours in excess of 40. These provisions are in strict accordance with the requirements of the Act and were adhered to in making all wage payments.

THE HELMERICH CASE DECIDED BY THIS COURT IS DISTINGUISHABLE.

The Court of Appeals bases its decision on the case of *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37 (R. 208). The split-day plan involved in that case was as extreme a perversion of wage calculation as can be conceived. According to the opinion in that case it was *imposed* on the employees who were forced to accept it whether they liked it or not. The day shift was divided 50-50 into "regular" hours and "overtime" hours. This resulted in its being an absolute impossibility for any employee to work 40 "regular time" hours in any one week. The rate called the "regular" rate was purely fictitious and bore no relationship to the rates actually paid. As this Court said, no real overtime was payable until 80 hours a week had been worked which would never occur in practice. How vastly different are those facts from the facts of the instant case where the split-day plan of calculating wages was inaugurated solely because the employees demanded that it be adopted, where 40 and 42 hours per week of regular time depending on the year, were worked regularly and paid for at the regular rate provided and time and a half paid for all overtime hours. There is nothing "artificial" or "arbitrary" about such a plan and it has no resem-

blance to the fictitious hours and wages of the *Helmerich* case.

As this Court said in the *Helmerich* case opinion:

> "Section 7(a) limits to 40 a week the number of hours that an employer may employ any of his employees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate 'not less than one and one-half times the regular rate at which he is employed'." (p. 39)

This requirement above expressed was complied with to the letter by petitioner. All hours in excess of 40 (or 42 depending on the year) were compensated for at a rate of one and one-half times the regular rate.

The opinion in the *Helmerich* case goes on to say:

> "The vice of respondent's* plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow compensation to be paid for true overtime hours." (p. 41)

In the instant case the contract regular rate was the rate which was actually paid for ordinary, non-overtime hours and compensation at the rate of time and one-half was actually paid for true overtime hours. This receives a practical demonstration from the fact that when a man worked only the first hours of any day, for example half a day, he only received pay at the regular time rate and received no overtime credit for that day. (Exs. 3F, G, 3K, 3M contain such examples.)

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*Another vital distinction is that in the Helmerich case the plan was the company's, whereas here it was the employees, and petitioner merely put in operation a split-day plan demanded by the men.

In the instant case the regular rate was established "in a bona fide manner" at the demand and insistence of the men themselves and was in no sense "unrealistic" and "artificial" and did not "negate the statutory purposes" as this Court has characterized the *Helmerich* plan (323 U. S. 42). Here the men were paid more than they would have received had the prior admittedly lawful Belo method of calculating wages been continued.

It is true that the *Helmerich* opinion states that nothing in the *Belo* decision "sanctions the use of the split-day plan" and it refers to "the applicability of the regular rate to the *first* (Emphasis ours) 40 hours actually and regularly worked" (323 U. S. 42), but we respectfully submit it was the distorted wage payment plan of that case which the Court had in mind and not a bona fide plan like the one here involved where the men actually profited by a change in plan brought about by their own insistence, and hence the language of that opinion should be limited to criticism of the wage agreement actually before it and others of like nature.

WALLING v. ALASKA PACIFIC CONS. M. CO., 152 F. (2d) 812.

The above entitled case decided by the same Appellate Court below is cited in support of its decision in the instant case. While not so extreme a case factually as the *Helmerich* case, it is based on the *Helmerich* decision. The facts of the *Alaska Pacific* case differentiate it from the instant case. In that case the split day plan was *imposed* on the employees who had no choice but had to accept it. That opinion states that the company,

> "did not base the regular rate upon the wages received, nor upon the hours actually spent in the normal non-overtime week * * *." (p. 814).

In the instant case, on the contrary, the regular rate was the rate the men demanded should be the regular rate and was the regular rate actually used in the computation of wages and was the rate actually applied to "the normal non-overtime week" of 40 (or 42 hours, as the case might be).

In the *Alaska Pacific* case the Court said:

> "An elaborate algebraic formula was devised in order to create the plan." (152 F. (2d) 813.)

Nothing of the sort took place here. The calculation of wages in the instant case was a matter of simple arithmetic. The regular hourly rate was a definite, specified, certain sum. Overtime was one and one-half times the regular rate. When the *Belo* plan of paying wages was in operation (Oct. 1938-Oct. 1939) this regular rate was multiplied by the statutory number of regular weekly hours and overtime hours were credited with one and one-half times the regular rate. Under the split-day plan the statutory number of regular work week hours for full time workers was also multiplied by the certain definite regular rate per hour and the overtime hours by 150% that specified regular rate, giving the identical result as under the prior valid *Belo* plan. For men who laid off a day or more during the week instead of subtracting those lost hours from the total which would result in the loss of all overtime, each day's time was calculated separately. The same certain regular rate was multiplied by

the agreed on regular number of hours worked each day and the agreed on overtime hours worked each day were multiplied by 150% of the regular rate. No complicated algebraic formula was required and the men benefited substantially by their own split-day plan of calculation, which supplanted the valid *Belo* plan.

THE TRIAL COURT'S DECISION.

The District Court gave this case careful consideration and its conclusions are well reasoned and meritorious. The *Helmerich* case, after careful analysis, is distinguished (Opinion, R. 48-50). As the trial Court cogently stated in its opinion:

> "It (the split-day plan) penalized no one but the defendant (petitioner here). *It would be incredible if the mere use of the word 'split-day' would have the magic power to render illegal a labor contract which was previously legal, even though wages paid thereunder remained the same or were increased.*" (R. 50, emphasis ours.)

(See also the fact findings of the trial Court, R. 69-79.)

IF THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT REVERSED THE KRUG-LEWIS AGREEMENT MUST UNDER THAT PRECEDENT BE HELD ALSO TO VIOLATE THE ACT.

There is now pending before this Court cases Nos. 759, 760, 781 and 782 involving the United States, John L. Lewis and the United Mine Workers of America. Those

cases involve an agreement controlling wages paid to all soft coal miners, drafted by the Secretary of the Interior, J. A. Krug, representing the United States, and John L. Lewis et al. That agreement through prior agreements which it refers to and incorporates, provides that wages of the miners be computed as follows: For the first five days of the week the men are credited each day at the "regular" or "straight time" rate for the first 7 hours and overtime or time and one-half for the 8th and 9th hours of each of these five days. If the miner chooses to work on the sixth day he receives overtime pay for any hours that he may work. In the instant case the 6-day men were paid "regular" or "straight time" for the first 7 hours of each day and overtime for the 8th hour. We have, then, a split-day plan of wage payment here involved, indistinguishable in principle from the Krug-Lewis soft coal agreement incorporating prior split-day agreements. The Krug-Lewis agreement, by incorporating the prior split-day agreements does not credit the *first* 40-hours of the week with regular or straight time pay as the Appellate Court below said must be done in order to comply with the Act. If the split-day agreement involved in the instant case constitutes a violation of the Act, then there is no escape from the conclusion that the split-day wage provisions of the Krug-Lewis soft coal agreement and the prior agreements which it incorporates, are a violation of the Fair Labor Standards Act.

It may be urged that because Krug in his capacity as "Coal Mine Administrator" represents the government, the latter is not bound by the Act. Even if true, it must be kept in mind the expectation is that the mines will

shortly be returned to the respective company owners, in which event they will inherit these split-day agreements, and all of the provisions of the Act will be applicable. If the decision of the Appellate Court below is not reversed the Krug-Lewis and prior incorporated agreements drafted and in force prior to government operation and all similar labor-employer agreements must, under that precedent, be held to violate and to have violated the Act in this respect. If the soft coal agreements should be held invalid for this reason, presumably the miners will cease working as they have done in the past when they have no contract to work under, and general public welfare will again be seriously affected. And, based on the reasoning of the Circuit Court of Appeals, hundreds of millions of dollars would be recoverable as unpaid wages and liquidated damages.

THE EMPLOYEES ARE ESTOPPED FROM CLAIMING THERE WAS ANY VIOLATION OF THE ACT.

The men, through their union, demanded that the split-day plan be adopted and were responsible for it. They have received its benefits and petitioner has sustained corresponding financial loss. Respondents are, therefore, estopped from demanding additional compensation. This principle of fundamental justice is based on the salutary premise that "no man may profit by his own wrong".

As Pomeroy says in his monumental work on "Equity Jurisprudence" (3rd ed. Vol. II, § 804):

> "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely pre-

> cluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led to change his position for the worse * * *."*

But the Appellate Court below states in its opinion in the instant case that the Fair Labor Standards Act involves "a right of a 'private-public character'," and hence this principle of equitable estoppel does not apply; and that if the men may not bind themselves by voluntary agreement, they may not by their conduct estop themselves. (R. 212.) This is to overlook the basic reason underlying equitable estoppel which does not depend in any sense on voluntary consent and agreement. Equitable estoppel operates independently of agreement and consent

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*It is a salutary practical rule that a man shall not be permitted to deny what he has once solemnly acknowledged. (*Sprigg v. Bank*, 10 Pet. 257, 265.)

The doctrine is founded, when properly applied * * * on the highest principles of morality and recommends itself to the common sense and justice of everyone. (*Van Rensselaer v. Kearney*, 11 How. 296, 326.)

"The vital principle (of equitable estoppel) is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectation on which he acted. Such a change of position is sternly forbidden." (*Dickerson v. Colgrove*, 100 U. S. 578, 580.)

"The law of estoppel is founded in reason and justice. It makes the acts and conduct of a party binding against him to assert any claim to the contrary. *He thus himself makes the law of his case, and he must abide the consequences.*" (Emphasis ours.) (*Hill v. National Bank*, 97 U. S. 450, 452-3.)

"Persons must take the consequences of the position they assume * * * To told otherwise would be contrary to the plainest principles of reason and of good faith and involve a mockery of justice." It involves "sound ethics." (*Casey v. Galli*, 94 U. S. 673, 680; *Gilbert v. United States*, 8 Wall. 358, 361.)

of the party estopped. It acts inexorably, and the will of the party estopped is not consulted; in fact, the estoppel operates contrary to his wish and will. It is true that "public interest" is involved in the Fair Labor Standards Act. But the doctrine of equitable estoppel is likewise based on "public interest".

The fact that the enforcement of a contract is against "public policy" does not prevent the operation of estoppel. (*Kinsman v. Parkhurst*, 18 How. 289, 293.)

"He entered of his own accord into the second contract and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract." *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303, 309; *Storm v. United States*, 94 U. S. 76, 83; *Fort Worth Co. v. Smith-Bridge Co.*, 151 U. S. 294, 302; *Magee v. United States*, 282 U. S. 432, 434.

The leading case on the subject by this Court (*Daniel v. Tearney*, 102 U. S. 415) holds, that the principle of equtable estoppel "has its foundation in wise and salutary policy. It is a means of repose. It promotes fair dealing * * *. *Like the Statute of Limitations it is a conservator, and without it society could not well go on.*" (p. 421, emphasis ours.) If this is not a principle found on "public interest", then it would be difficult to find one. This decision says, in so many words, equitable estoppel is "like the Statute of Limitations". If equitable estoppel is not controlling here, then "it follows as the night the day" the

bar of the Statute of Limitations may not be invoked in any case involving the Act, and yet the Courts without exception have applied the bar of limitations.

Not to apply in the instant case the "wise and salutary" doctrine of equitable estoppel, without which "society could not well go on", would be, to use the language of this Court, "a mockery in judicial administration and 'a violation of the plainest principles of reason and justice'." (102 U. S. 415, 422.)*

Wherefore, for the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
December 28, 1946.

ALASKA JUNEAU GOLD MINING COMPANY,
Petitioner,

By WM. E. COLBY,
Counsel for Petitioner,

GEO. W. WILSON,
Of Counsel.

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*See also to the same effect: *Shepard v. Barron*, 194 U. S. 553, 567-8; *Pierce v. Somerset Ry.*, 171 U. S. 641, 648; *U. S. Gas Co. v. R.R. Comm.*, 278 U. S. 300, 307-8; *Calhoun v. Massie*, 253 U. S. 170, 177; *Hine v. Morse*, 218 U. S. 483, 510-11.

CERTIFICATE OF COUNSEL.

I, WM. E. COLBY, counsel for the petitioner, do hereby certify that in my judgment the foregoing petition for Writ of Certiorari is well founded, and I further certify that the same is not interposed for delay.

Dated, San Francisco, California,
December 28, 1946.

WM. E. COLBY,
Counsel for Petitioner.